OPINIONS, JUDGMENTS AND ORDERS BELOW.

Copies of the following pleadings filed in the United States District Court are contained in the Appendix hereto. The abbreviation "A" refers to the appendix to this petition.

Complaint (A. 1-A. 6).
Answer (A. 6-A. 9).
Motion for Judgment on the pleadings, and or for partial summary judgment (A. 9-A. 10).
Order overruling and disallowing motion (A. 10).
Motion for Judgment on the pleadings, and or for partial summary judgment (A. 11).
Judgment (A. 12).
Motion for Judgment Non Obstante Veredicto, or in the alternative for a new trial (A. 13-A. 23).
Memorandum Opinion, District Court (A. 23-A. 28).
Order denying motion for judgment n. o. v., but granting a new trial (A. 29).
Order pertaining to discretionary appeal by plaintiff (A. 29-A. 30).
Order granting discretionary appeal to plaintiff (A. 30-A. 31).
Charge of District Court (A. 31-A. 47).
Final Judgment entered pursuant to rule 54 (b), Federal Rules of Civil Procedure (A. 48-A. 49).
Opinion U. S. Court of Appeals for the Sixth Circuit (A. 50-A. 54).
Judgment U. S. Court of Appeals for the Sixth Circuit (A. 54-A. 55).

Upon motion made by petitioner, said Court of Appeals stayed its mandate on said judgment upon condition that a petition for writ of certiorari be filed with this Court.

JURISDICTION.

Jurisdiction to review by writ of certiorari the judgment of said Court of Appeals entered May 9, 1961, is invoked under the provisions of 28 U. S. C. A., Sec. 1254 (1) and Section 1651 (a).

QUESTIONS PRESENTED FOR REVIEW.

(1) We adopt as one of the questions that one posed by the Court of Appeals for the Sixth Circuit, as follows:

> "In federal court litigation, in the State of Tennessee in cases involving multiple claims, will a general verdict of the jury for the plaintiff be sustained by applying such general verdict to any of the claims for relief which are sound and supported by substantial evidence, even though other claims for relief may have been defective and improperly submitted to the jury, or not supported by substantial evidence?"

(2) Did the District Court commit prejudicial error in submitting to the jury Tracy's claim for damages based upon an alleged breach of an implied warranty in consequence of which, and in the interest of justice, the Court was required to grant a new trial?

CONSTITUTIONAL PROVISION INVOLVED.

The Seventh Amendment to the Constitution provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

STATUTE INVOLVED.

The Tennessee statute here involved is Sec. 20-1317, of the Tennessee Code Annotated:

> **"Verdict Applied to Good Count.**
>
> "If any counts in a declaration are good, a verdict for entire damages shall be applied to such good counts (Deriv. Act 1801, Ch. 6, Sec. 63).".

STATEMENT RESPECTING LITIGATION.

Hereinafter, petitioner, The Finn Equipment Company, will be referred to as "Finn", and respondent, John Tracy, as "Tracy".

Tracy, a citizen of New York, sought damages for personal injuries from Finn, a corporation organized under the laws of Ohio, and maintaining its principal place of business in Ohio, but having a place of business and agent upon whom process could be served, in the State of Tennessee.

Tracy asserted two grounds for his cause of action:

(1) Negligence on the part of Finn in the design of the machine;

(2) Breach of implied warranty of the safety of the machine for the use to which it was to be put (A. 1-A. 6).

Finn entered into a sales agreement with Meadow Brooks Nurseries, Inc., a New Jersey corporation, and pursuant thereto delivered a mulching machine to the purchaser in Brooklyn, New York. Thereafter, and on September 10, 1958, Tracy sustained injuries while cleaning certain mulching materials from the blades of the blower fan in the machine (A. 1-A. 6).

Admittedly there was no privity between Tracy and Finn. Therefore Finn moved the Court for judgment on

the pleadings, and or for partial summary judgment seeking an adjudication that Tracy failed to state a cause of action for an alleged breach of an implied warranty (A. 9-A. 10-A. 11).

The motion was overruled (A. 10).

Thereafter, the Court gave prejudicial instructions to the jury, respecting Tracy's right to recover damages for an alleged breach of an implied warranty, to which instructions exceptions were duly made (A. 31-A. 47).

The jury returned a general verdict for Tracy, awarding damages of $65,000.00.

Finn seasonably moved the Court for a judgment non obstante veredicto, or in the alternative for a new trial (A. 13-A. 23).

The Court overruled the motion for judgment non obstante veredicto, but granted Finn a new trial for error in failing to sustain Finn's motion for judgment on the pleadings, and or for partial summary judgment, and for error in charging the jury on the claim based upon an alleged breach of implied warranty (A. 23-A. 28).

Tracy perfected two appeals to the Court of Appeals, for the Sixth Circuit, one in consequence of a final judgment entered pursuant to rule 54 (b) Federal Rules of Civil Procedure (A. 48-A. 49). The other in consequence of Sec. 1292 (b), Title 28 U. S. C. A. (A. 29-A. 30).

The Court of Appeals pretermitted all questions save one, i. e., the applicability of Sec. 20-1317, Tennessee Code Annotated. The Court of Appeals reversed the order of the District Court, granting a new trial, and held, despite the provisions of the Seventh Amendment to the Constitution of the United States, that a State statute of Tennessee, pertaining to procedure in State Courts, must be given effect in diversity actions tried in Federal Courts of Tennessee.

REASONS FOR GRANTING THE WRIT.

I. The entry of judgment in the Court of Appeals for Respondent Tracy, applying a procedural statute of the State of Tennessee, has deprived petitioner Finn of its rights, secured by the Seventh Amendment to the Constitution of the United States, to have facts tried by a jury re-examined only in accordance to the rules of the common law.

Tracy, a resident of New York, who was injured in New York by a machine sold in Ohio, by an Ohio corporation, to a New Jersey purchaser, which machine was delivered to New York in consummation of the purchase, chose the United States District Court in Tennessee, as a forum. Having done so, he now insists that procedural statutes of the State of Tennessee, having application alone to State Courts, shall be given force and effect in the United States District Court, in Tennessee, though giving effect thereto would violate the provisions of the Seventh Amendment to the Constitution of the United States of America, which provides that no fact tried by a jury shall be otherwise re-examined in any Court of the United States, **than according to the rules of the common law** (Emphasis supplied).

The Court of Appeals for the Sixth Circuit cited as a precedent, **Louisville & Nashville Railroad Co. v. Rochelle,** 252 F. 2d 730 (1958); and **Atlantic Coastline Railroad Co. v. Smith,** 264 F. 2d 428 (1959).

In L & N Railroad Co. v. Rochelle, the ruling of the Court was but dictum. Were it otherwise the Court did not consider nor deal with an erroneous charge, which under applicable federal decisions, suffices to vitiate an entire verdict.

Again, in Atlantic Coastline Railroad Co. v. Smith, the holding of the Court respecting Sec. 20-1317 T. C. A., was dictum.

In **Majestic v. L & N Railroad**, 147 Fed. (2d) 621, the Court refused to give application to Sec. 20-1317, T. C. A., where a general verdict had been rendered. The Court stated:

> "In jury trials erroneous rulings embodied in instructions are presumptively injurious and furnish grounds for reversal unless it affirmatively appears they were harmless. Fillippon v. Albion Vein Slate Company, 250 U. S. 76, 82, 39 S. Ct. 435, 63 L. Ed. 853. From an examination of the entire record, we are of the opinion that the instructions complained of by appellant were harmful and calculated to mislead the jury.' Cause reversed and remanded to the District Court for a new trial and for further and other proceedings in conformity with this opinion."

A like result obtained in **Louisville & Nashville Railroad Co. v. Farmer**, 220 Fed. (2d) 90, wherein the Court did not apply Sec. 20-1317 T. C. A. The Court stated in part:

> "The jury rendered a general verdict, from which it cannot be determined whether it found for appellees on the theory based upon alleged violation by appellant of section 2628 (4) of the Code of Tennessee, or on appellees' theory based on the alleged violation of the Springfield city ordinance. Accordingly, our only recourse is to grant a new trial, at which the court will correctly charge the jury in compliance with this opinion."

From the foregoing, it is to be observed that the Sixth Circuit Court of Appeals, in the **Majestic** and **Farmer** cases, apply the principles of the common law, while in the **Rochelle** and **Smith** cases, by dictum, the Court approved the application of Sec. 20-1317 T. C. A.

The Court of Appeals for the Sixth Circuit, further relied upon **Guaranty Trust Co. v. York**, 326 U. S. 99, and **Byrd v. Blue Ridge Electric Coop.**, 336 (356) U. S. 525, as au-

thority for the application of the Tennessee procedural statute.

Finn respectfully submits that neither the **Guaranty Trust Company** case, nor the **Byrd** case, are supportive of the result attained by the Court of Appeals.

In the **Guaranty Trust Company** case, supra, the Court had under consideration the applicability of a statute of limitations of New York, and whether same would be applied to bar the right of action of the plaintiff in a suit for equitable relief in a federal court. The Supreme Court, in deciding that the Federal court must follow and apply the New York statute of limitations, held that said statute of limitations was so vitally a part of plaintiff's right of action that the limitations statute could not be divorced or separated from the substantive rights of the plaintiff. In so holding the Court stated:

> "Plainly enough, a statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly. As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law" (89 L. ed. 2087).

It is respectfully submitted that Section 20-1317, T. C. A., is **purely a Tennessee procedural statute**, and in no way bears upon Tracy's right of action against Finn for his alleged injuries suffered as a result of accident in the State of New York. In other words, in the case at bar, Tracy is trying to invoke the Tennessee procedural statute in a federal court in aid of a New York created right of action. It is respectfully submitted that the Tennessee procedural statute forms no part of Tracy's right of action, or substantive right created for him by the law of New York, which alone is applicable to his common law negligence count.

In the **Byrd** case, the Court had under consideration the South Carolina Workmen's Compensation statute, and a state court decision construing said statute holding that it was **for the Judge and not the jury** to decide on the evidence whether the owner was a statutory employer within the meaning of the statute. The Supreme Court of the United States, in holding that the Federal Courts were not bound by the procedural decisions of the State Court of South Carolina, and in holding that on remand the aforesaid factual question should be submitted to the jury, rather than the court, for determination, said:

> "But cases following Erie have evinced a broader policy to the effect that the federal courts should conform as near as may be **in the absence of other considerations** to state rules even of form and mode where the state rules may bear substantially on the question whether the litigation would come out one way in federal court and another way in the state court if the federal court failed to apply a particular local rule. E. g., Guaranty Trust Co. v. York (U. S.), supra; Bernhardt v. Polygraphic Co. of America, Inc., 350 U. S. 198, 100 L. ed. 199, 76 S. Ct. 273. Concededly the nature of the tribunal which tries issues may be important in the enforcement of the parcel of rights making up a cause of action or defense, and bear significantly upon achievement of uniform enforcement of the right. It may well be that in the instant personal injury case the outcome would be substantially affected by whether the issue of immunity is decided by a judge or a jury. Therefore, were 'outcome' the only consideration, a strong case might appear for saying that the federal court should follow the state practice.
>
> "But there are affirmative countervailing considerations at work here. The federal system is an independent system for administering justice to

litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common law actions, it distributes trial functions between judge and jury and, **under the influence—if not the command**—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury. Jacob v. New York, 315 U. S. 752, 86 L. ed. 1166, 62 S. Ct. 854. The policy of uniform enforcement of state-created rights and obligations, see e. g., Guaranty Trust Co. v. York (U. S.), supra, cannot in every case exact compliance with a state rule not bound up with rights and obligations which disrupts the federal system of allocating functions between judge and jury. Herron v. Southern P. Co., 283 U. S. 91, 75 L. ed. 857, 51 S. Ct. 383. Thus the inquiry here is whether the federal policy favoring jury decisions of disputed fact questions should yield to the state rule in the interest of furthering the objective that the litigation should not come out one way in the federal court and another way in the state court.

"We think that in the circumstances of this case the federal court should not follow the state rule." (Emphasis supplied.) (2 L. ed. 2d, pp. 962-963.)

Further, the court in the **Byrd** opinion, stated:

"**We have discussed the problem upon the assumption that the outcome of the litigation may be substantially affected by whether the issue of immunity is decided by a judge or a jury.** But clearly there is not present here the certainty that a different result would follow, cf. Guaranty Trust Co. v. York, 326 U. S. 99, 89 L. Ed. 2079, 65 S. Ct. 1464, 160 A. L. R. 1231, supra, or even the strong possibility that this would be the case, cf. Bernhardt v. Polygraphic Co. of America, Inc., 350 U. S. 198, 100 L. Ed. 199, 76 S. Ct. 273, supra. There are factors present here which

might reduce that possibility. The trial judge in the federal system has powers denied the judges of many states to comment on the weight of evidence and credibility of witnesses, and discretion to grant a new trial if the verdict appears to him to be against the weight of the evidence. We do not think the likelihood of a different result is so strong as to require the federal practice of jury determination of disputed factual issues to yield to the state rule in the interest of uniformity of outcome." (2 L. Ed. 2d 963-964.) (Emphasis supplied.)

The Court of Appeals, for the Sixth Circuit, stated, in part, in its opinion:

> "The evidence that applied to the improper count was the same as that in support of the negligence contention, and prejudice is wanting."

Finn respectfully takes issue with this statement. The Court charged the jury respecting "the improper count" that under the law of the State of Ohio, privity was unnecessary (A. 34-A. 35, A. 41); that warranty of fitness would run to an employee of the purchaser (A. 35); that the jury could find for Tracy on the question of implied warranty (A. 41); that damages should be awarded for the breach of an implied warranty (A. 41); that the statutes of Ohio pertaining to warranties had application (A. 46); in failing to give Finn's special request, that Tracy could not rely upon an alleged breach of an implied warranty (A. 23); in failing to charge Finn's special request that there was no implied warranty upon which Tracy could rely (A. 25).

Apropos all statements of this Honorable Court in the **Byrd** case, can it be said in the case at bar, that upon a retrial of the case on the first, or common law count of Tracy's complaint, that another jury will reach a different

conclusion from that of the first jury, with regard to the same count? In other words, do we now know what decision the jury reached with regard to the first count under its general verdict? If not, how can it now be stated that a second jury will reach a different conclusion with regard thereto. It seems that to ask the foregoing question in effect answers the problem posed for this Court's consideration.

Section 20-1317 T. C. A. Does Not Embody the Common Law Rule.

The rule in Tennessee under Code Sec. 20-1317 is not the common law. This is expressly recognized in a leading Tennessee Text, **Caruthers History of a Law Suit (Seventh Edition, 1951), Sec. 384.** Section 20-1317 T. C. A. was derived from an early legislative act in 1801. The act was entitled "An Act to Regulate the Proceedings of the Court of Equity and for the Amendment of the Law." Sec. 63, provided, "That where there are several counts one of which is faulty, and entire damages is given, the verdict shall be good; but the plaintiff may apply to the court to instruct the jury to disregard such faulty count." Scott, Law of Tennessee, 1715-1820, Vol. 1, Pt. 2, p. 694.

In an early case the Court pointed out that the rule was contrary at common law to that embodied in the 1801 Act. **Prusell v. Archer, Peck (Tenn. 1824), 317, at 319.**

In the Federal Courts, State Procedure Cannot Constitutionally Be Applied When the Effect Is to Prevent the Defendant From Having a Jury Trial as at Common Law, and to Deprive It of a Review That Is Different Than That at Common Law.

In **Parson v. Bedford (1831), 28 U. S. 433,** it was held that suits at common law meant all suits not of equity or admiralty jurisdiction.

One of the basic elements of the right to a jury trial is the province of the jury to determine fact issues under **appropriate instructions** by the court. (Emphasis supplied.) **Baltimore and Carolina Line, Inc., v. Redman (1935), 293 U. S. 654.**

Litigants cannot by state rules of procedure be deprived of fundamental rights guaranteed by the Constitution and Laws of the United States, such as the right to trial by jury. **Lyon v. Mutual Benefit Health and Accident Association** (1939), 305 U. S. 484, rehear. den. 306 U. S. 667.

Under the Seventh Amendment, a United States trial judge does not have the authority which a state judge may have of granting a new trial upon condition, i. e., the trial judge may not condition the denial of a plaintiff's motion for a new trial upon defendant's consent to increase to a specified amount damages awarded by the jury. **Dimick v. Schiedt** (1935), 293 U. S. 474.

The principle that the common law may be adapted to meet varying conditions does not apply in determining scope and meaning of the Seventh Amendment, which, in respect to jury trials, adopted common law rules as they existed in 1791. **Dimick v. Schiedt** (1935), 293 U. S. 474.

The Federal Court of Appeals, in a diversity case, will follow the federal rule that questions pertaining to the excessiveness of a verdict is for the Federal Trial Court and will not follow the rule of the State Supreme Court in disregard of the Seventh Amendment. **Reid v. Nelson** (C. C. A. 5th, 1946), 154 F. 2d 724, cert. den. 323 U. S. 718, rehear. den. 323 U. S. 813.

This case is most significant. It was there urged that a state rule in Florida, which permitted and required a state appellate court to reduce verdicts which it considered excessive, was applicable under Erie R. v. Tompkins. The court said:

"The decision in Erie R. Co. v. Tompkins, supra, could not have the effect of requiring this court to follow the state court in disregard of the Seventh Amendment." 154 F. at 726.

In **Deupree v. Levinson** (C. A. 6th, 1950), 186 Fed. (2d) 297, 303-303 (Cert. den. Sup. Crt. U. S.—341 U. S. 915, 95 L. Ed. 1351), the court held that in diversity cases the substantive right created by statute is controlled by state law, but **procedural matters** are governed by the law of the forum (Federal Courts).

To similar effect see:

Diedrich v. American News Co. (C. C. A. 10th, 1942), 128 F. 2d 144;

McKeon v. Central Stamping Co. (C. C. A. 3rd, 1920), 264 F. 385;

Burcham v. J. P. Stevens & Co. (C. A. 4th, 1954), 209 F. 2d 35;

Howard v. Louisiana & A. Ry. Co. (C. C. A. 5th, 1931), 49 F. 2d 571;

Highey v. Sullivan (C. C., Ohio, 1897), 80 F. 72;

Wright v. Paramount-Richards Theatres (C. A. 5th, 1952), 198 F. 2d 303;

Werthan Bag Corp. v. Agnew and Agnew v. Werthan Bag Corp. (C. A. 1953), 202 F. (2d) 119;

Youdan v. Majestic Hotel Management Corp. (C. A. 1942), 125 F. 2d 15.

The Majority of Federal Decisions Approve the Granting of a New Trial When Error Exists in an Improper Charge on One Claim, or an Error in Submitting One Claim to the Jury.

In **Detroit, T. & I. R. Co. v. Banning** (CCA 6th, 1949), 173 Fed. (2d) 752 (cert. den. 338 U. S. 815), the Court held that where only one of two alleged grounds of negli-

gence should have been submitted to the jury, which returned a general verdict for the plaintiff, and **there was no way to determine on which of the two issues the verdict was based, a new trial was required.** (Emphasis supplied.)

To the same effect is **Chesapeake & Ohio Ry. Co. v. Thomas** (CA 4th, 1952), 198 F. (2d) 783 (cert. den. 344 U. S. 921). In this case the Court improperly instructed the jury as to one ground of negligence, but properly instructed it on the other. The Court held this to be reversible error, stating:

> "Since the jury could have based its finding of negligence on this ground as well as on the other one charged, it being a general verdict, the instruction was prejudicial to the defendant and the case must be remanded for a new trial." (at p. 788.)
>
> . . . . . .
>
> "To allow such a question as is here involved to reach the jury would be to mask a wisp of suspicion with the cloak of hard fact" (at p. 788).

To the same effect see:

Roth v. Swanson (CCA 8th, 1944), 145 F. 2d 262;
Northern Pacific Ry Co. v. Haugan (CA 8th, 1950), 184 F. 2d 472;
Baltimore & O. R. Co. v. Deneen (CCA 4th, 1947), 161 F. 2d 674;
Baltimore and O. R. Co. v. Reeves (CCA 6th, 1926), 10 F. 2d 329;
Atlantic Coast Line R. Co. v. Tiller (CCA 4th, 1944), 142 F. 2d 718;
Fidelity & Casualty Co. of New York v. Fornaro Co. et al., (CCA 6th Cir., 1942), 130 F. (2d) 877.

Citing with approval: **Fillippon v. Albion Vein Slate Co.**, 250 U. S. 76, 39 S. Ct. 435, 61 L. Ed. 853.

Also see:

Chicago & N. W. R. Co. v. Garwood (CCA 8th, 1948), 167 F. 2d 848;

North American Graphite Corp. v. Allan (C. A., D. C. 1950), 184 F. 2d 387;

Patton v. Wells (CCA 8th, 1903), 121 F. 337;

Travelers' Ins. Co. v. Wilkes (CCA 5th, 1935), 76 F. 2d 701;

Mercer v. Byrons et al. (CA 1st, 1952), 200 F. (2d) 284.

Federal Rules of Civil Procedure Provide for Granting of New Trial.

The Federal Rules of Civil Procedure expressly provide for the granting of new trials without reference, in diversity cases, to states' statutes, or decisions. **Rule 59, Federal Rules of Civil Procedure**, provides in pertinent part, as follows:

> "New Trials: Amendment of Judgments—
>
> (a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States;"

It is significant to note that provision is thus made for the granting of new trials, for any other reasons for which new trials have been granted in actions at law "in the courts of the United States".

In this procedural matter, the Federal Rules apply. **Erie Railroad Company v. Tompkins**, 304 U. S. 64, 59 Sup. Ct. 817, can have no application, in that this deals with substantive law, not procedural.

In **Barron and Holtzoff, Federal Practice and Procedure** (Rules Ed. 1950), Vol. 1, Sec. 8, p. 25, it is stated:

> "So far as federal procedure is concerned, the federal rules govern, the Conformity Act is superceded, and state laws or rules of practice are without force . . .
>
> "The federal rules governing procedure, and the Erie doctrine requiring application of state laws to matter of substance theoretically cover mutually exclusive fields."

Finn respectfully submits that the Court of Appeals for the Sixth Circuit erred in applying a Tennessee procedural statute, at variance with the common law, when re-examining matters tried by a jury,—this in contravention of the provisions of the Seventh Amendment to the Constitution of the United States of America.

II. The District Court erred in refusing to grant Finn's motion for judgment on the pleadings, and or for partial summary judgment, and in charging the jury that Tracy could recover damages for breach of an implied warranty. Having so erred, the Court properly granted Finn's motion for a new trial.

The Court of Appeals, pretermitted all questions, with the exception of the application of Sec. 20-1317, T. C. A. Nevertheless, Finn respectfully submits that it is proper to herein set forth its contentions respecting the law applicable to Tracy's right of action for an alleged breach of an implied warranty.

Tracy's Action for Breach of Implied Warranty Controlled by New York Decisions.

There is no principle of conflict of law that is better settled than that the lex loci delictus controls all matters of

substance. **Restatement Conflicts of Law, Secs. 378, 389, Beale, Conflict of Laws, Sec. 1288 ffw. (1935).**

In **Goldberg, Admrx., v. American Airlines, Inc., et al.,** 199 N. Y. S. (2d) 134 (February 16, 1960), the Court considered an action for wrongful death based upon breach of warranty, and stated:

> "It is the place of injury that determines the rights of the parties, and where recovery is sought on the theory of breach of warranty, the governing law is that of the jurisdiction in which the accident rather than the sale took place. (Poplar v. Bourjois, Inc., 298 N. Y. 62, 80 N. E. (2d) 334) . . . But where, as here, the plaintiff's intestate made no contract with the defendant, the law of the place where other parties contracted can have no influence on the case."

To the same effect see **Hunter v. Derby Foods, Inc.,** 110 Fed. (2d) 970 (2nd Cir.).

New York Denies an Injured Party a Cause of Action for Personal Injury, for a Breach of an Implied Warranty, Where There Is No Privity Between the Parties.

Campo v. Scofield et al., 301 N. Y. 468, 95 N. E. Rep. (2d) 802;

Turner v. Edison Storage Battery Co., 248 N. Y. 73, 161 N. E. 423;

Timpson v. Marshal, Meadows and Stewart, Inc., et al., 101 N. Y. Sup. (2d) 583;

Chysky v. Brake Bros. Co., Inc., 235 N. Y. 468, 139 N. E. 576;

Inman v. Binghampton Housing Authority, 3 N. Y. (2d) 137, 143 N. E. (2d) 895;

Messina v. Clark Equipment Company, 263 Fed. (2d) 291.

Typical of the holdings in each of the cases above is the statement of the Court in the **Campo** case:

"Since there is no claim of privity of contract between the defendant manufacturer and plaintiff, the complaint cannot, of course, be sustained on any theory of implied warranty."

Tracy Does Not Have an Action Against Finn for an Alleged Breach of an Implied Warranty Under Applicable Ohio Statutes and Decisions.

If Finn be mistaken in its asserted belief that applicable New York decisions are controlling, and if the applicable decisions of Ohio are to be regarded as controlling, even so, Tracy may not assert a claim for his injuries sustained in New York, based upon an alleged breach of an implied warranty.

The Statutory Law of Ohio Negates an Implied Warranty From Finn to Tracy.

Baldwin's Ohio Revised Code, Sec. 1315.16, describes a "sale in which warranty is implied."

Under the factual situation, in the case at bar, there could have been no such implied warranty, pursuant to statute, in that Meadow Brooks Nurseries, Inc., received, examined and used the Finn mulch spreader, and Tracy himself examined and used the spreader, prior to his injury.

In **American Radiator & Standard Sanitary Corp. v. The Titan Valve & Manufacturing Co.**, 246 Fed. (2d) 947 (6th Cir. 1957), Section 1315.16, Revised Code of Ohio, was considered. The Court there held that where a purchaser made his own inspection which should have revealed the defects, there could be no recovery for breach of implied warranty.

Tracy May Not Assert a Claim for Breach of an Implied Warranty, Under Ohio Decisions, in That There Was No Privity of Contract.

The Appellate decisions of Ohio require privity before an action can be maintained for breach of an implied warranty. The following authorities substantiate this statement:

Wood v. General Electric Co., 159 Ohio St. 273, 112 N. E. (2d) 8 (1953);

Welsh v. Ledyard, dba Western Auto Stores, 167 Oh. St. 57, 146 N. E. (2d) 299 (Supreme Court of Ohio 1957);

Canton Provision Co. v. Gauder, 130 Oh. St. 43, 196 N. E. 634;

Steele, Admrx. v. Westinghouse Electric Corp., 159 N. E. (2d) 469 (Court of Appeals of Ohio, Jan. 30, 1958).

The following authorities relied upon by Tracy **do not** support his assertion that privity is unnecessary to the maintenance of an action for breach of implied warranty.

Rogers v. Toni Home Permanent Co., 167 Oh. 244, 147 N. E. (2d) 672 (Supreme Court of Ohio, Jan. 29, 1958).

This was a cause of action for breach of an expressed warranty.

Markovich v. McKesson & Robbins, Inc., 149 N. E. (2d) 181 (Court of Appeals of Ohio, April 2, 1958).

This was a case in which the Court held that an action could be maintained for breach of an express warranty.

Since the rendition of the two opinions aforementioned, the Court of Appeals of Ohio rendered an opinion in **June**

Kennedy, Plaintiff-Appellant, v. General Beauty Products, Inc., Defendant-Appellee, 167 N. E. (2d) 116.

Noteworthy is the fact that the opinion of the Ohio Court of Appeals in the **Markovich** case was written by Judge Skeel. Judge Skeel similarly wrote the opinion in the **Kennedy** case, in which it was held that in the absence of privity there could be no action for breach of implied warranty.

From the foregoing it is to be noted that the last decision from an Ohio Appellate Court requires privity before an action may be maintained for breach of implied warranty.

CONCLUSION.

For the reasons herein stated, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

THE FINN EQUIPMENT COMPANY,

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